REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 10 OF 2019

CHEPKONGA ARAP RUTO

ROBERT MWISANI ON BEHALF OF THEMSELVES AND 18 OTHERS.....PLAINITFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU.....DEFENDANT

J U D G M E N T

1. The present suit was commenced before the Senior Principal Magistrate's Court at Nakuru as SPMCC No.1341 of 1994 and was transferred to this Court by Hon. Lady Justice Ngetich on 31st January 2019 pursuant to an application for transfer made before the high court. Once received the file was re-numbered as Nakuru ELC No.10 of 2019. It is unclear how the matter had remained unresolved from 1994 when it was filed up to 31st January 2019 when an order for its transfer to this court was made.

2. In the plaint dated 24th January 1994 filed before the magistrate's court, the plaintiffs claimed they were members of Kalenjin Enterprises Ltd and had been allocated plot numbers 925,813 and 908 respectively. The plaintiffs claimed the defendant was interfering with the said plots and wanted the defendant to be restrained from blocking access to their said plots or in any matter interfering with the said plots which they stated were public properties. The plaintiffs sought judgment against the defendant for:

> *1. A permanent injunction restraining the defendant her servants and/or agents including Konoike Construction Co. Ltd from interfering in any manner whatsoever with the plots and access road contained in and serving all that piece or parcel of land commonly known as Kalenjin Enterprises situate within Nakuru Municipality.*
>
> *2. Costs of the suit/and interest at court rates till payment in full.*
>
> *3. Any other further relief this Honourable to grant to avoid defeat of the*

3. The Defendant Municipal Council of Nakuru, filed a defence dated 14th September 1994 where it denied the averments contained in the plaint. The defendant stated it acquired the suit premises from Kalenjin Enterprises Limited through the Commissioner of Lands. The Defendant stated it acquired the suit premises for purposes of setting out sewerage works thereat. The defendant denied that it had blocked the plaintiffs access to their parcels of land and prayed that the plaintiffs suit be dismissed with costs.

4.Although the record shows there have been numerous applications made in this matter there is no evidence on record that the initial plaint and defence filed in the magistrate's court were ever amended. However on 3rd February 2020 pursuant to a Notice of Motion dated 26th December 2019, Nakuru Water & Sanitation Services Ltd were ordered to be enjoined to the proceedings as an interested party. The joinder of the interested party was on the basis that they stood to be directly affected by any decision that the court may make as they were the party who were presently utilizing the suit property for sewerage works.

5. The foregoing was the state of the pleadings as at 18th February 2021 when the suit was heard before me. At the trial, two witnesses testified on behalf of the plaintiffs. The first of the plaintiffs witnesses was Chepkonga Arap Ruto (PW1) the 1st plaintiff herein who testified that they filed the present suit in 1994 as Nakuru CMCC No.1341 of 1994. He explained that the file got misplaced and they had the same reconstructed vide Misc App No.123 of 2018 after which hearing commenced on 6th June 2018 before the Chief Magistrate but the court ruled that it lacked the pecuniary jurisdiction to handle the matter precipitating the filing of HC Misc Application No. 316 of 2018 pursuant to which the lower court file was ordered transferred to this court.

6.PW1 testified that the suit involved damage caused to their properties in 1994 at Rhoda Kalenjin Enterprises Ltd land Block 29. He stated

that they had cultivated 20 acres where they had planted maize and beans. It was his evidence that on an acre they were harvesting 10 bags of beans and 20 bags of maize. He also testified they had planted various types of trees and they had a tree nursery on the land. He stated that the defendant demolished 10 temporary structures including a house and store belonging to him.

7. PW1 stated that the defendant did not demonstrate how they acquired the land where they constructed some houses. He stated the plaintiffs were seeking damages from the defendant for the loss they had suffered. He testified that they had assessed the loss at Kshs.224,540,000/= as tabulated at page 24 of the bundle of documents they had filed. He however stated they had not sought services of a Valuer or loss assessor to quantify the loss.

8. On cross examination PW1 stated he was a member of Kalenjin Enterprise Limited having purchased the share of one Teres Mrefu . He stated that Kalenjin Enterprises owned several parcels of land within Nakuru including Rhoda Block 29 which measured about 756 acres. He stated the defendant took 56 acres of the said 756 acres. He testified at the time the defendant moved in, no titles had been processed. He said his parcel of land was Number 813 and stated that the place where the sewerage was put was where they had been cultivating. He said the defendant appropriated the 56 acres and was not given by the directors of Kalenjin Enterprises Ltd.

9. Daniel Maina Kirungui testified as Pw2. In his testimony he relied on the witness statement filed in court on 11th May 2019. He stated he was a shareholder of Rift Valley Enterprises and that he owned plot No.Mugwathi Block 2/470. He stated he was elected a director of Kalenjin Enterprises Limited in 1998. He stated the plaintiffs complained to the company about the defendant interfering with their plots. He testified that the Commissioner of Lands never paid any compensation to the company in regard to the land acquired by the defendant for sewerage works.

10.Under cross examination the witness stated the Gazette Notice for the acquisition of the Land for the defendant was issued in 1973. He said the plaintiffs land was within the 56 acres allegedly acquired for the defendant and he affirmed there were sewerage works on the disputed site.

11.The defendant called Enerst Amugune (DW1) as their sole witness. In his evidence he relied on the witness statement dated 20th September 2019 and the bundle of documents filed in support of the defendant's case. He testified that Nakuru Municipality Block 29 was initially L.R No.6273 and belonged to Kalenjin Enterprises Ltd. He stated at the time of subdivision, Kalenjin Enterprises Ltd gave to the Municipal council of Nakuru 56 acres and the Commissioner of Lands vide a Gazatte Notice issued on 14th June 1973 gave notice of intention to acquire the land which was to be set aside for sewerage works purposes .

12.The witness stated that the 56 acres were clearly delineated in the Registry Index Map (RIM) relating to Nakuru Municipality Block 29 (Rhoda) formerly LR No.6273 (RIM produced as "DEX2"). The 56 acres are designated as Nakuru Municipality Block 29/1201. The witness indicated the plaintiffs plots were distinctly shown on the RIM and were quite apart and separate from the defendant's land parcel Nakuru Municipality Block 29/1201. He stated Kalenjin Enterprises Ltd did not raise any objection to the intended acquisition of the 56 acres. The witness explained that presently sewerage services are undertaken by the interested party. He stated there were no crops or trees damaged by the defendant as alleged by the plaintiffs. He stated at the land parcel Nakuru Municipality Block 29/1201 there are staff houses for the interested party.

13. Under cross examination by the 1st plaintiff the witness stated that the Gazette Notice issued by the Commissioner of Lands Covered land from Mwariki Farm (246 acres) and land from Kalenjin Enterprises Farm (56 acres). He affirmed Kalenjin Enterprises Ltd never objected to the acquisition.

14. Following the closure of the trial the court directed the parties to file their submissions. The plaintiff did not file any submissions and none were on record at the time of the preparation of the judgment. The defendant filed their submissions on 20th May 2021. I have reviewed the pleadings, the evidence adduced, and the submissions filed on behalf of the defendant. The issues that arise for determination are as follows: -

(i) Whether the plaintiffs have demonstrated they had a proprietary interest on the portion of 56 acres acquired by the defendants?

(ii) Whether the plaintiffs are entitled to an order of permanent injunction?

(iii) Whether the plaintiffs would be entitled to an award of damages when by their pleadings the same had not been pleaded?

(iv) Who bears the costs of the suits?

15. The plaintiffs case is that they were members of Kalenjin Enterprises Limited that owned several parcels of land within Nakuru including L.R No.6273 which after conversion under the Registered Land Act, Cap 300 Laws of Kenya (now repealed became Nakuru Municipality Block 29). The plaintiffs claim they were shareholders of the company and by reason of their shareholding they were each allocated individual parcels of land which they occupy. The dispute involves a portion of 56 acres out of Block 29 that the defendant stated was given to then by the company following acquisition by the commissioner of lands. There is no dispute that the portion of land was owned by Kalenjin Enterprises Limited. The plaintiffs did not adduce any evidence that either of them had been allocated any plot by the company within the 56 acres. PW2 who testified in support of the plaintiffs case stated that he was elected a director of Kalenjin Enterprises Limited in 1998 that was long after the plaintiffs had instituted the present case. PW2 did not himself own any land within Block 29 but had land in Dundori Mugwathi farm also owned by Kalenjin Enterprises Limited. It was his evidence that the plaintiffs came to the company's office complaining that the defendant was interfering with their plots. It remains unclear how the plaintiffs came to be in possession and/or occupation of the 56 acres if they had not been allocated by the company.

16. The defendant tendered in evidence Gazette Notice No.1790 issued by the Commissioner Lands on 11th of June 1973 which signified the Government's intention to acquire part of LR No.8894 Nakuru District Company 246.132 acres (Mwariki Farm) and part of LR No.6273 Nakuru District comprising 56.00 acres (Kalenjin Enterprises Farm).The Commissioner of Lands vide Gazettee Notice No.1791 of same date gave notice of inquiry which was to take place on 30th July 1973 at 11.00 a.m at the Nakuru Municipality to hear any compensation claims from any persons interested in the said Lands. Finally, the Commissioner of Lands vide Gazettee Notice No.1792 equally of the same date gave notice of intention to take possession of the Lands pursuant to section 19 (2) of the Land Acquisition Act (now repealed).The taking of possession was to take place on the expiry of 15 days from the date of the publication of the Notice of intention to acquire the said lands.

17. The Notice of intention to acquire is clear that the land was required for Nakuru sewage schemes. Once the intention to acquire the land was notified the only option available to any person who had any interest in the land was to file a claim for compensation which was to be heard during the date scheduled for the inquiry. There is no indication whether Kalenjin Enterprise Limited filed any claim and if so how the same was disposed of. Kalenjin Enterprises Limited not being party in these proceedings, it is not possible to ascertain whether they freely gave out the land and/or they were compensated following the acquisition of the land by the government. What is apparent however, is that the plaintiffs had at the time no interest over the 56 acres acquired by the government for Nakuru Sewarage Scheme .The process of acquisition having been carried out in 1973 and the commissioner of Lands having given notice that he would take possession of the land on behalf of the government, the land became vested in the government, and Kalenjin Enterprise Ltd in my view ceased to have any further interest and/or right over the land.

18. From my foregoing discussion and analysis it follows, in 1994 when the plaintiffs claim to have been in possession and using the suit premise, neither Kalenjin Enterprises Ltd or themselves had any proprietary interest over the suit property. The property (56 acres) belonged to the government as it had already vested following the acquisition. In the premises I answer the first issue in the negative that the plaintiffs had no proprietary interest in the suit land.

19. On the second issue whether or not the plaintiff would be entitled to an order of permanent injunction it follows that having found and held that the plaintiffs had no proprietary interest over the suit property, they would not be entitled to an order of permanent injunction. The suit property in 1994 had vested in the government and the land had been reserved for the development of Nakuru sewerage Scheme. The fact that the sewerage works may not have been commenced, did not give the plaintiffs any rights over the land. The government cannot be injuncted from utilizing its own land for the intended purposes. The prayer for a permanent injunction was misconceived and would not be available to the plaintiffs .

20.The plaintiffs at the trial appeared to have totally altered their claim against the defendant. What they sought to prove was not what they had pleaded. The plaintiffs were pitching for an award of damages for allegedly structures that had been demolished, crops and trees that had been damaged including a tree nursery that was supposedly destroyed. The 1st plaintiff (PW1) quantified the loss/damage at a staggering sum of Kshs.224,540,000/=. The plaintiffs did not plead any claim of damages in their plaint and even though the suit has now been before the court for over 25 years, no application to amend the plaint was ever made.

21. It is a cardinal rule of law that parties are bound by their pleadings. A party cannot be allowed to adduce evidence to prove what they had not pleaded in their pleadings. The plaintiffs in the present case sought to prove a case that was not before the court. Indeed the damages that the plaintiffs were seeking to prove were in the nature of special damages and would have required to have been specifically pleaded and specifically proved. In the case of ***Hahn -Vs- Singh (1985) KLR 716*** the court stated:-

> *"—special damages must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of act themselves.*

22. The necessity to particularly plead special damages is so that the opposing party is put on notice respecting the loss and /or damage sought and its make up so that they determine how to respond to the claim. The rationale for the rule that parties are bound by their own pleadings is that a party cannot be allowed to raise what amounts to a fresh case or issue without due amendment of the pleading being made. The essence is so that each party is aware of the case they have to meet at the trial to avoid instances of trial by surprise and/or ambush. The court for its part is bound by the pleadings of the parties as they are and the court is not free to adjudicate upon any issue that has not been pleaded.

23. In the case of ***Caltex Oil (Kenya) Ltd -vs- Rono Limited (2016) eKLR*** the court of Appeal commenting on award of general damages where the same had not been pleaded stated as follows :-

> *" In the plaint, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility".*

24. In the instant case it is not clear why the plaintiffs never pleaded either special and/or general damages and as the court of appeal held in the *Caltex Oil (Kenya) Ltd* case *(supra)* this court would be acting in futility if it was to entertain the plaintiffs claim for damages adverted to during the trial.

25. The net result is that I find and hold that the plaintiffs have failed to prove their case on a balance of probabilities. The same is devoid of any merit and is dismissed with costs to the defendants.

26. Orders accordingly .

DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF OCTOBER 2021.

J M MUTUNGI

JUDGE